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The core issue in *Miller*: The relevance of section 1 of the 1972 Act

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Executive Summary

The legal controversy in the *Miller* case may now be distilled in the following way. The government argues that it has a general power to withdraw from treaties, which it certainly does. The claimants argue that the executive does not have a power to frustrate a statute, which it certainly does not. The government argues that Parliament legislated in 1972 (and afterwards) against the background of a settled practice that the power of the Crown to withdraw from treaties is untrammelled. The claimants respond that there was never such a treaty as the set of EU Treaties and hence the previous practice is irrelevant.

This paper suggests that the correct interpretation of s. 1 of the European Communities Act 1972 ['ECA'] strengthens the government position in *Miller*. The paper does so by explaining the legislative choice expressed in s. 1 ECA with the aid of the clear interpretative statements made in Parliament by government representatives during the legislative work on what became the ECA.

Both the scheme of the ECA 1972 and the debates on it assumed that the Crown has an inherent constitutional power (not conferred by the ECA or any other statute) conclusively to enter (under international law) into treaties constituting important amendments to the Community Treaties. That power both to sign and to ratify was neither conferred by nor restricted in the ECA. Parliament only sought to influence – as distinct from authorise -- its exercise by giving to each House of Parliament (*not* to Parliament, the Queen-in-Parliament, itself) the opportunity to approve or withhold approval of the government's incorporating such future amending treaties *into internal UK law* simply by Order in Council declaring them (with conclusive effect) to be Community Treaties. ECA s. 1(3) confers that remarkable incorporation power of the government, subject only to resolutions in each House. The fact that it has scarcely been exercised in relation to treaties amending EEC/EU Treaties does not affect Parliament's intent in 1972.

In relation to *Miller*, this strongly supports the view that withdrawal from the Community (now EU) Treaties was not, *in law*, subjected by the ECA 1972, even implicitly, to the requirement alleged by the claimants and the Divisional Court, that it be pre-authorised by the Queen-in-Parliament. Moreover, if that power of the government was confirmed and not curtailed by the ECA 1972, the most comprehensive incorporation of – and apparatus for incorporating – EU law into UK law, why would anyone think that Parliament impliedly intended later statutes, like the European Parliamentary Elections Act 2002 or the Communications Act 2003, to be protected from the normal effect of withdrawing from a treaty, namely that statutes presupposing events, processes etc. predicated on treaties may be left high and dry by the cessation

of the UK's involvement in such events and processes? The claimants' assertion that those statutes created, as a strange side-effect, a kind of incorporation into UK law of EU rights existing under non-incorporated EU rules (about the European Parliament, for example) remains quite without support.

On the main issue, as well as the side issue just mentioned, the government has the stronger case. The claimants have to make a bold argument rejecting established constitutional practice and attributing to Parliament in 1972 and to subsequent Parliaments a very robust intent to change the law in unprecedented ways, an intent of which there is no sign in the ECA or the debates on its enactment. How many Justices of the Supreme Court will recognise this remains to be seen.

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Introduction

The hearings in the *Miller* appeal are now over.[1] Many arguments were raised before the Supreme Court by the government and by the various other parties. Some of the arguments added little to the *legal* force of either side's position, however strongly emotive they were (e.g. the Commons motion on Article 50,[2] the Sewel convention, rights of children[3]). In this paper, I will focus on what the legal problem in *Miller* boils down to, ignoring what I see as weak or irrelevant points. My conclusion is that the government has the stronger legal case. Naturally, I cannot hope to predict what the Supreme Court will decide.

I argue that the correct interpretation of s. 1 of the European Communities Act 1972 ['ECA'] strengthens the government position in *Miller*. I do so by explaining the legislative choice expressed in s. 1 ECA with the aid of the clear interpretative statements made in Parliament by government representatives during the legislative work on what became the ECA. There are two propositions at the heart of my analysis, which are both the correct statement of the law and what the government of 1972 claimed in Parliament. First, the ECA did not impose any legal condition on *ratification* of treaties amending the Community (now EU) treaties. Second, the ECA allowed for *incorporation* of future amending treaties into domestic law to be triggered by a mere

[1] *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union and associated references* ['Miller'] UKSC 2016/196, 2016/201, 2016/205; case materials available at https://perma.cc/6T96-P6CF. All hyperlinks accessed on 20 December 2016 (permanent record of websites created using perma.cc).

[2] HC Deb 7 December 2016, vol 618, cols 333-336 [https://perma.cc/GN6Z-JSUL].

[3] Case for AB, KK, PR, and Children ('the AB Parties'), UKSC 2016/196 [http://www.bhatiabest.co.uk/ab.pdf]

Order in Council subject to affirmative consent procedure; hence, by design, it allowed for major changes in domestic law to be introduced without any further Act of Parliament

The core issue

What *Miller* boils down to is one legal issue that may be characterised in two ways:

(I) the scope of the prerogative power to withdraw from international treaties
(II) or the scope of the principle that prerogative cannot be used to frustrate the legislative choice of Parliament.

The government claims to have a general and 'untrammelled' prerogative power to withdraw from treaties, including the EU Treaties. The other side responds: yes, the government has a prerogative power to withdraw from treaties, but only to the extent that this would not alter a UK statute, alter UK common law or *frustrate* the legislative choice of Parliament expressed in a statute. To this extent, I think the claimants' argument is unobjectionable. But to succeed they need also to show that to leave the EU by way of executive action would violate one of those limits of prerogative power.

On the one hand, not a word of an Act of Parliament nor a single rule of the common law would change if the government unilaterally denounced the EU Treaties this instant. The same would be true in the case of exiting the EU by reaching the two-year deadline from Article 50 TEU. Also, what is at issue is not 'dispensing with' or 'suspending of laws'. The European Communities Act 1972 [ECA], the Communications Act 2003 and all other Acts of Parliament that refer to EU law would have the same words and be just as effective had the UK exited the EU, other things held constant.

However, it is also true that the legal content of an Act of Parliament is not strictly speaking exhausted by the words used. What is constitutive of the legal content is the legislative choice made by Parliament. The words used are our first guide to the legislative choice, but they need to be read in context: of the rest of the law as it was at the time of enactment and of the mischief that the statute addressed.

Frustration of an Act of Parliament

'Frustration' of a statute is nothing more than an example of action inconsistent with the legislative choice of Parliament. The question of what counts as frustration of a

statute in any given case is a question of statutory interpretation. If it cannot otherwise be shown that Parliament required something, then it is no answer that there is some background anti-frustration principle that protects all effects of a statute from interference due to executive action. The issue is not about the 'loss of rights' in itself, but as Lord Mance noted on the third day of oral argument,[4] it is about what Parliament decided. It is possible that the 'loss of rights' does not at all frustrate any statute and hence is not a bar for executive action.

I accept as uncontroversial that it is outside of the scope of the prerogative, including the prerogative power to withdraw from treaties, for the executive to do something that an Act of Parliament or the common law requires not to be done. There are then two possibilities:

1) UK law, in providing for effect of EU law in UK law, did so (in every case) contingently on UK being a party to the EU Treaties (and without limiting the ordinary role of the Crown in withdrawing from international treaties). *The government wins*.
2) UK law, in providing for effect of EU law in UK law, did so in a way that would be frustrated by withdrawal from the EU Treaties. *The government loses.*

Crucially, we are not in a comfortable situation of being able to rely on express words of a statute to resolve this matter. One might be drawn to conclude, somewhat poetically, that both sides must argue from the sound of silence. However, this may be misleading given that, as I noted earlier, the literal meaning of the words used, taken in isolation, does not exhaust the legal content of a statute.

[4] *Miller*, Transcript of proceedings, Wednesday 7 December 2016, p 57 [https://www.supremecourt.uk/docs/draft-transcript-wednesday-161207.pdf].

Interpretation of the European Communities Act 1972: what about s. 1?

The correct interpretation of s. 1 ECA and its importance

As John Finnis argued,[5] the first possibility of the two I just raised is consistent with the background (historical) practice of giving effect to international law in UK law predating enactment of the ECA 1972. It is easy to see the strong parallel between s. 497(1) of the Income and Corporation Taxes Act 1970 [ICTA] and s. 1 and s. 2(1) ECA 1972. Both statutes provide *direct* authority for international law to have effect in UK law. Importantly, s. 2(1) ECA relies for identification of relevant treaties on s. 1(2) ECA *and* on Orders in Council pursuant to s. 1(3) ECA, just as s. 497(1) ICTA relies on Orders in Council. There is, in law, no need for an Act of Parliament to effect such an important change as adding a new treaty to the set of incorporated treaties.

Appearing for the claimants (against the government), Lord Pannick QC put significant weight on the point that s. 1(3) ECA covers only 'ancillary' treaties entered into by the UK and on the narrowness of the notion of 'ancillary' treaties.[6] He was right on the first point, but wrong on the second.

The scope of s. 1(3) ECA is controlled by s. 1(2) ECA. Section 1(2) ECA specifies what are 'the Treaties' ('the Community Treaties') that later provisions of the ECA incorporate into UK law (e.g. s. 2(1) ECA). There are three devices that s. 1(2) ECA uses to define 'the Community Treaties':[7]

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[5] John Finnis, '*Brexit* and the Balance of Our Constitution' (Sir Thomas More Lecture on 1 December 2016 at Lincoln's Inn) [http://judicialpowerproject.org.uk/wp-content/uploads/2016/12/Finnis-2016-Brexit-and-the-Balance-of-Our-Constitution2.pdf].

[6] *Miller*, Transcript of proceedings, Tuesday 6 December 2016, p 196-197 [https://www.supremecourt.uk/docs/draft-transcript-tuesday-161206.pdf].

[7] The full text of s. 1(2) ECA as enacted:

> 'In this Act and, except in so far as the context otherwise requires, in any other Act (including any Act of the Parliament of Northern Ireland)—
>
> "the Communities" means the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community ;
>
> "the Treaties" or "the Community Treaties" means, subject to subsection (3) below, the pre-accession treaties, that is to say, those described in Part I of Schedule 1 to this Act, taken with—
>
> (*a*) the treaty relating to the accession of the United Kingdom to the European Economic Community and to the European Atomic Energy Community, signed at Brussels on the 22nd January 1927 ; and

(I) enumeration of international measures (letters (a)-(b) of the ECA as enacted, and (a)-(v) of the current version[8]);

(II) reference to 'any expression defined in Schedule 1' to the ECA;

(III) and the following open reference to other treaties (the quote is from the original enacted version):

'and any other treaty entered into by any of the Communities, with or without any of the member States, or entered into, as a treaty ancillary to any of the Treaties, by the United Kingdom'.

In turn, s. 1(3) ECA empowers Her Majesty conclusively to declare, by Order in Council, that a treaty 'is to be regarded as one of the Community Treaties as herein defined' (i.e. as defined in s. 1(2) ECA). Clearly, there is no point to so declaring any of the treaties already enumerated in s. 1(2) ECA or in Schedule 1 ECA. What is then left is the open reference from s. 1(2) ECA (and an analogous one from Part I of Schedule 1 ECA and dealing with treaties predating 22 January 1972).

Hence, s. 1(3) ECA allows for conclusive declaration only regarding treaties that are:

(A) 'entered into by any of the Communities' or

(B) entered into by the UK and are 'ancillary' to Community Treaties.

This is also the understanding of s. 1(3) ECA that the government of the time, represented by the Solicitor General, presented in Parliament during the legislative work on what became the ECA 1972.[9]

(*b*) the decision, of the same date, of the Council of the European Communities relating to the accession of the United Kingdom to the European Coal and Steel Community ;

and any other treaty entered into by any of the Communities, with or without any of the member States, or entered into, as a treaty ancillary to any of the Treaties, by the United Kingdom ;

and any expression defined in Schedule 1 to this Act has the meaning there given to it.'

[8] Section 1(2) of the ECA was subsequently amended several times to add express references to new international measures. The argument of this paper is that, at least in some cases, this was not legally required and it reflected a political decision of the kind envisioned in the original ECA 1972. See footnotes 19-20 below and accompanying text.

[9] HC Deb 1 March 1972, vol 832, col 701 [https://perma.cc/63UH-NDRV], the Solicitor General Sir Geoffrey Howe QC MP said:

'The second part of subsection (3) is a special provision ensuring that any treaty entered into by the United Kingdom after 22nd January, 1972, ancillary to the Community treaties, shall not be so specified and, therefore, shall not be regarded as a treaty having that effect until it has been the

However, for this to be of any help to his case, Lord Pannick needs the Court to accept that 'ancillary' in s. 1(3) ECA means something like 'subordinate' and hence was not intended to cover any future treaties amending the Community Treaties defined in Schedule 1 to the ECA. Such a reading could hurt the government's case because it would suggest that Parliament decided in 1972 that the way for future amendments of the Community Treaties to affect domestic law would be to amend the ECA 1972 through an Act of Parliament. Lord Pannick referred in support of his reading of s. 1(3) ECA to the subsequent practice that all major revisions of the Community Treaties were approved by Acts of Parliament.

The better argument is that the opposite is the case, and that treaties amending Community Treaties are ancillary and could thus be incorporated by declaratory Order in Council as envisaged by s. 1(3) ECA. The correct interpretation of the European Communities Act, and of the role of s. 1 ECA in particular, strengthens the government's position in *Miller*.

Of great help in understanding the scheme of s. 1 ECA are the clear interpretative statements made in Parliament, during the legislative works on what became the ECA 1972, by the Solicitor General Sir Geoffrey Howe QC MP as the government representative (and supported by statements of the then Chancellor of the Duchy of Lancaster Geoffrey Rippon QC MP, who was the minister in charge of negotiating the UK's entry into the EEC).

The government of 1972 was clear (and was correct to claim) that:

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subject of an affirmative Resolution by both Houses of Parliament. There is that express protection built into the Clause in relation to treaties entered into by the United Kingdom ancillary to Community treaties after the date of the signature on 22nd January, 1972.'

See also, e.g., HC Deb 7 March 1972, vol 832, col 1334 [https://perma.cc/G23C-QGV5], the Solicitor General said:

'My right hon. and learned Friend asked why the words as a treaty ancillary to were included in Clause 1(2) and omitted from Clause 1(3). The provision under subsection (3) for specifying a treaty as one to be regarded as a Community treaty applies to either kind of treaty referred to in subsection (2). The categories listed in lines 5 to 8 include first: any other treaty entered into by any of the Communities, with or without any of the member States". There is no "ancillary" phrase there. It refers to a treaty entered into by the Community with or without the member State as co-signatory. The second category is a treaty: entered into, as a treaty ancillary to any of the Treaties, by the United Kingdom Either of those categories of treaty can be the subject of an Order in Council under subsection (3). The phrase "ancillary to" does not carry through into the second part.'

(1) the ECA did not impose any legal condition on *ratification* of a major amending treaty (this is shown by the Solicitor General's discussion of the ECA as a 'safeguard' and 'protection' for Parliament' and of the Ponsonby rule)[10] and

(2) the ECA allowed for *incorporation* (on the terms of the ECA) of future amending treaties triggered by a mere Order in Council subject to affirmative consent procedure; hence, by design, it allowed for major changes in domestic law to be introduced without any further Act of Parliament.[11]

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[10] HC Deb 1 March 1972, vol 832, col 701 [https://perma.cc/63UH-NDRV], the Solicitor General said:

> 'There is that express protection built into the Clause [now s. 1(3) ECA] in relation to treaties entered into by the United Kingdom ancillary to Community treaties after the date of the signature on 22nd January, 1972.
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> … The protection exists and I do not wish the House of Commons to say that it has not had this presented to it clearly.
>
> … The effect of removing subsection (3) would be to remove the protective provisions arising from the necessity for the Order in Council.'

HC Deb 7 March 1972, vol 832, col 1334 [https://perma.cc/G23C-QGV5], the Solicitor General said:

> 'That is a real, effective and genuine safe-guard, and it does not deserve to be dismissed in the way in which some right hon. and hon. Members have sought.'

HC Deb 8 March 1972, vol 832, col 1536 [https://perma.cc/Z8RN-9BXC], the Solicitor General said:

> '… so far as concerns a treaty coming into the treaty complex to which the United Kingdom is a party, that kind of treaty is firmly subject to the second part of subsection (3), so as to set beyond doubt the right of both Houses of Parliament to have an affirmative Resolution in respect of United Kingdom treaties. It is in order to introduce the safeguard that we have been discussing in respect of United Kingdom treaties that the second part of subsection (3) exists.'

Ibid., col 1540 (the Solicitor General):

> 'Treaties entered into by the United Kingdom with or without any of the Communities would be within the Ponsonby Rule if they required ratification, and they would also be within the requirements of the second part of subsection (3). So the Ponsonby Rule can be an unnecessary duplication, since the Order in Council procedure would apply to treaties to which the United Kingdom was a party, whether or not they required ratification.'

Ibid., col 1543 (the Solicitor General):

> 'The point that I am making is that any treaties to which the United Kingdom is to be a party and which are made under the Clause would require an affirmative Resolution, in respect of an Order in Council, by both Houses. That is plainly provided for and that is wider than the Ponsonby Rules, because it will apply whether or not the treaties require ratification.'

See also nn 23-24 below and accompanying text.

[11] HC Deb 7 March 1972, vol 832, col 1277 [https://perma.cc/G23C-QGV5], the Solicitor General said:

> 'As soon as the treaty is one to which the United Kingdom would in itself be a party, as it would plainly have to be if it were to be embarking on anything outside the scope of the existing Community treaties, it is immediately covered by the second part of subsection (3) …'

Ibid., col 1341 (the Solicitor General):

> 'The treaty-making power of the existing Community institutions is as defined by the existing treaties. If any attempt was made, or any desire expressed, by member States to extend that treaty-making power outside the commercial and tariff territories which were referred to by the right hon. Gentleman the Leader of the Opposition five years ago, that would involve an amendment of the Community treaties—of the same quality, for example, as those listed in the first part of Schedule 1 which altered the nature of the institutions in establishing a single Council and so on.

In fact, without s. 1(3) ECA, incorporation of future amending treaties would not have required an Act of Parliament because s. 1(2) would have provided for their incorporation automatically as a matter of law.[12]

The two parts of s. 1(3) ECA as enacted were as follows (formatting added):

> Treaties of that kind to extend the scope of the original treaty-making power of the Community institutions would require participation of member States. They would be altering the ambit and nature of the powers hitherto vested in the Community. They would be treaties falling within the second part of subsection (3) to which the United Kingdom would be a party and in respect of which the procedure there set out would have to be followed.'

Ibid., col 1341-1342:

> 'Mr. Powell:
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> Since my hon. and learned Friend the Solicitor-General is coming to the main argument, I take it that what he has just said would apply not only to an extension of a treaty-making power in the Community, but also to an extension of a sphere within which the Community could make directly-acting law?
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> The Solicitor-General:
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> That would be right, yes. The existing power of the Community to make directly-applicable law derives from the treaties and the operation and the various articles there set out. Any extension of that would require further participation by the member States in the making of new treaties which would be subject to the second part of subsection (3) as a safeguard.'

Ibid., col 1344 (the Solicitor General):

> '… and no one who has considered this with any seriousness … has doubted that future treaties are in a different category. That is why they are covered by the second part of subsection (3). In respect of the future treaties Parliament will control the ultimate right to pull down the Government, to overthrow the prospective acceptance or approval of the Order in Council. Specifying the treaty would remain, and it really would be unfair to Parliament itself, and almost a parody, to suggest that it would not, and could not, remain able to reject or accept future extensions under the second part of subsection (3), as it has done in the past.'

HC Deb 8 March 1972, vol 832, col 1549-1550 [https://perma.cc/Z8RN-9BXC], the Solicitor General said:

> 'I come to the other category of treaties to which my right hon. Friend has attached importance, those which would require the participation of the United Kingdom, which would or could have the effect of extending the scope of the original Rome Treaty and, therefore, of extending, for example, the scope of the treaty-making power of the Community institutions. It is in respect of those treaties that the provisions set out in the second part of subsection (3) apply.
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> … He referred to the necessity for any change, be it great or small, in the scope of the existing treaties being subjected to the full legislative procedures of the House of Commons. That is not either necessary or wise.
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> … with treaties requiring United Kingdom participation … treaties potentially extending the scope of the European Communities step by step down the road which some people want to go more or less than others, then it is important that Parliament should be able to intervene. The opportunity for Parliament to intervene by way of the affirmative Resolution procedure should not be dismissed as frail and insubstantial …'

[12] See, e.g., HC Deb 1 March 1972, vol 832, col 701 [https://perma.cc/63UH-NDRV], the Solicitor General said:

> 'The effect of removing subsection (3) would be to remove the protective provisions arising from the necessity for the Order in Council.'

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> If Her Majesty by Order in Council declares that a treaty specified in the Order is to be regarded as one of the Community Treaties as herein defined, the Order shall be conclusive that it is to be so regarded;
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> but a treaty entered into by the United Kingdom after the 22nd January 1972, other than a pre-accession treaty to which the United Kingdom accedes on terms settled on or before that date, shall not be so regarded unless it is so specified, nor be so specified unless a draft of the Order in Council has been approved by resolution of each House of Parliament.

Section 1(2) ECA as enacted did not provide for automatic incorporation of the ancillary treaties entered into by the UK, because the second part of s. 1(3) ECA excludes that possibility ('shall not be so regarded').[13] *But for* the second part of s. 1(3) ECA (after the semicolon) any future treaty that had the character of an 'ancillary' treaty would have been incorporated by s. 1(2) the moment the UK entered into it (i.e. when ratified under Crown prerogative).

In the ECA as enacted, such automatic incorporation due to s. 1(2) ECA was only provided for the treaties 'entered into by any of the Communities' but not by the UK.[14]

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[13] HC Deb 7 March 1972, vol 832, col 1339 [https://perma.cc/G23C-QGV5], the Solicitor General said:
'If either House refused consent to an affirmative Resolution under the second part of subsection (3), that treaty would form no part of the treaty complex and would not operate to change the law in this country.'
HC Deb 8 March 1972, vol 832, col 1535 [https://perma.cc/Z8RN-9BXC], the Solicitor General said:
'If one looks at the second part of subsection (3), one finds that, as I said yesterday a treaty entered into by the United Kingdom after the 22nd January, 1972 … shall not be so regarded. —in other words, shall not be regarded as one of the Community treaties— unless it is so specified, nor be so specified unless a draft … has been approved. Shall not be so regarded"— that is to say, regarded as a Community treaty within the definition of the words "Community treaties", so that it does not come into the complex from which, for example, rights, powers and liabilities can apply under Clause 2(1) unless it is brought within the concept of Community treaties. It cannot so be brought without being specified in an order which is subject to the affirmative Resolution of the House of Commons.'

[14] HC Deb 7 March 1972, vol 832, col 1395-1396 [https://perma.cc/VF5W-F8P5], the Chancellor of the Duchy of Lancaster said:
'I can understand the anxieties which have been expressed about the fact that provision for an affirmative Order in Council in Clause 1(3) does not apply to these treaties entered into by the Community. …
Since our treaty obligations will call for us to be automatically bound by treaties entered into by the Communities, their binding effect for member States cannot be dependent upon action by national Parliaments. Since they will be automatically binding upon us, it follows that our law must, in advance, be such as to enable us to give effect to any rights and obligations arising for the United Kingdom under them. Thus it is necessary, as the Bill provides, for these treaties to be automatically

Any s. 1(3) ECA Orders in Council declaring that *those* treaties are to be regarded as the Community Treaties are of only evidential import.[15]

The import of the second part of s. 1(3) (after the semicolon) is therefore twofold:

- Orders in Council made pursuant to this provision settle (in evidential terms) what are the future treaties entered into by the UK that fall under s. 1(2) ECA and
- it provides a 'shield to Parliament' by giving each of the Houses of Parliament a power to veto incorporation of a future ancillary treaty entered into by the UK.

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within the definition of treaties for the purposes of the Bill without the need for any further parliamentary procedure after their conclusion.'

HC Deb 14 March 1972, vol 833, col 352 [https://perma.cc/8JJ3-P6DV], the Solicitor General said:
'So far as future treaties entered into by the Community without member States are concerned, such treaties are included by definition in Clause 1(2) whether or not there is a declaratory order under the first part of Clause 1(3).'

[15] HC Deb 1 March 1972, vol 832, col 701 [https://perma.cc/63UH-NDRV], the Solicitor General said:
'The first four lines of subsection (3) are evidential … That is merely machinery not unlike that which we find in other international law provisions whereby, as a matter of evidence, the Order in Council can declare that a treaty is or is not a Community treaty.'

HC Deb 7 March 1972, vol 832, col 1334 [https://perma.cc/G23C-QGV5], the Solicitor General said:
'My right hon. and learned Friend asked what would be the effect on Clause 2(1) of omitting Clause 1(3), which is the effect of the Amendment. The effect of that would be to diminish the safeguard in subsection 3(b) and would be to remove the convenient—and I mean that literally—provision contained in the first part of Clause 1(3). It might have no legal effect on existing treaties but it would certainly make it less convenient, in the context of the questions put by my right hon. and learned Friend, for citizens, courts and legal practitioners not to have available to them the first part of subsection (3) so as to set beyond doubt the question of whether or not a treaty was a Community treaty.
… Several members have suggested that the first part of subsection (3), far from being a shield, is a threat. … I put it forward, as I did last Thursday, as a useful clarifying evidential instrument.'

Ibid., col 1336 (the Solicitor General):
'The first part of subsection (3) contains no more than a reasonable, sensible and necessary evidential provision for removing doubt about a treaty that is plainly in the complex of those related to or ancillary to Community ones and is for the convenience of those who would have to apply them thereafter.'

HC Deb 8 March 1972, vol 832, col 1532 [https://perma.cc/Z8RN-9BXC], the Solicitor General said:
'One comes to the question of how subsection (3) will work … the first part is intended to be evidential in order to make plain, in any situation where doubt might arise, that a treaty was to be regarded as one of the treaties as defined in this Clause.'

Ibid., col 1536 (the Solicitor General):
'The answer to that question is that the first part of subsection (3) is evidential … a treaty could be a treaty within the meaning of the Bill without there having been an Order in Council, and that follows from the nature and quality of a Community treaty.'

The talk about providing a 'shield to Parliament' is somewhat loose, because s. 1(3) ECA does not condition incorporation on any action of *Parliament* (which acts through Acts of Parliament), but on actions of the two Houses of Parliament. Strictly speaking, the Commons and the Lords each get a shield, Parliament gets nothing.

The Solicitor General presented s. 1(3) ECA as a 'safeguard' and 'protection', because without it there would have been nothing in law to stop future UK governments from ratifying amending treaties without any parliamentary involvement and thus triggering a change in domestic law due to ss. 1(2) and 2(1) ECA (the only limit was the legally non-binding Ponsonby rule).[16]

Importantly, 'ancillary' in s. 1(2) ECA covers not only 'subordinate' treaties, but also treaties supplemental to or amending the Community Treaties. The Solicitor General made it crystal clear that treaties 'altering the ambit and nature of the powers' of the EEC are 'ancillary' and fall within what was to become s. 1(2) ECA and therefore also within s. 1(3) ECA.[17]

Not *all* possible treaties amending the Community Treaties are 'ancillary.' As the Chancellor of the Duchy of Lancaster stated:

> If a treaty is to be regarded as ancillary, it must be auxiliary to the purposes of the present treaties. It is inconceivable that a major defence Community treaty going outside the economic purposes of the present Community could be regarded as ancillary.[18]

The point is, however, that some important amendments to the Community Treaties, capable of significantly affecting UK domestic law (when incorporated due to s. 1(2) ECA and other ECA provisions) were clearly intended to be covered by s. 1(2) and s. 1(3) ECA and therefore their incorporation by the ECA 1972 was not intended to require an Act of Parliament.

Interestingly, the Solicitor General anticipated the future practice that Lord Pannick relies on for his mistaken interpretation of s. 1(3) ECA. He said:

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[16] See n 10 above.

[17] See n 11 above.

[18] HC Deb 15 March 1972, vol 833, col 684 [https://perma.cc/GR39-BCNY].

> Suppose a treaty extending, or potentially extending, the scope of Community powers were to be introduced merely by Order in Council under that provision [s. 1(3) ECA]. Suppose, then, that a significant part of the House thought that it was one that required the introduction of substantive legislation, to make detailed changes of the kind contained in the second Part of the Bill, for example. That action would be one of the considerations that Parliament would want to bear in mind in deciding whether to approve the specification of a treaty in that way. One of the reasons why approval could be refused would be not merely that Parliament did not like it, but that Parliament was not prepared to tolerate the Executive resorting to acceptance of it merely by an Order in Council.[19]

What the Solicitor General's speech describes is the practical and political reality of giving each of the Houses of Parliament (but not to Parliament!) a veto on incorporation of future treaties:

(I) If a majority of either House thinks that an Act of Parliament would have been more appropriate, they can veto (or threaten to veto) a draft Order in Council and a government that wishes to ratify a treaty with domestic effect under s. 2(1) ECA would need to get Parliament to enact such an Act of Parliament.

(II) If a government has reasons to believe that a majority of either House will oppose some proposed treaty because of its *content*, then that would be a practical reason for the government not to proceed to sign that treaty or to ratify if already signed.[20]

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[19] HC Deb 8 March 1972, vol 832, col 1551 [https://perma.cc/Z8RN-9BXC].
See also, ibid., col 1552 (the Solicitor General):

> '… the extent to which Parliament would react and would require the Government to react by taking the matter to legislation would depend on the nature of the matter under consideration.
> I suggest that this is a properly adjusted, diverse method whereby Parliament can assert its control—[Interruption.]—diverse, because Parliament can react by making it clear that the treaty should be the subject of legislation or one that it would be prepared to accept by an Order in Council, with the Government facing the constant threat that they would not receive affirmative support for the necessary Order in Council.
> … If the Government were to come forward seeking to make a change by an Order in Council in a situation which Parliament regarded as more appropriate for legislation, no doubt approval would be refused …'

[20] HC Deb 7 March 1972, vol 832, col 1342 [https://perma.cc/G23C-QGV5], the Solicitor General said:

> 'The question before the House would be whether to approve by resolution a draft of the Order in Council specifying whether a treaty should be so regarded. I cannot imagine that in such a debate on that question it would not be open to the House and hon. Members to argue that we should not approve this Resolution because we do not like this treaty—this treaty to which the United Kingdom

This is what subsequently happened, from the legal point of view. The later practice of seeking parliamentary approval before ratification of treaties revising the Community Treaties is perfectly consistent with the position that Parliament specifically *chose* to be involved in all the cases where the powers of European institutions were being *extended*.[21] Just like the Solicitor General predicted.

There is a statement made by the Solicitor General in this context that needs to be read closely for its meaning not to be misconstrued. He said:

> … But the Executive would be subject to exactly the same constraints in making such a treaty as are described by Lord Atkin in the passage which has been cited so many times. If the Executive made a treaty which came under this category seeking to extend the scope of the Community institutions, it would know that it did so beyond the limits of what Parliament would affirm at its peril. If the treaty was not so confirmed by the Order in Council procedure, it could not be taken to ratification and would not form part of the Community treaties in the context of this Bill.[22]

The Solicitor General did not mean to say that it would have been *unlawful in domestic law* for the executive to proceed with ratification in such a case. His 'could not be taken to ratification' must be understood in light of the preceding sentence: '… the Executive would be subject to exactly the same constraints in making such a treaty as are described by Lord Atkin …'. The case in question is *Attorney-General for Canada v Attorney-General for Ontario*[23] where Lord Atkin said:

> It will be essential to keep in mind the distinction between (1.) the formation, and (2.) the performance, of the obligations constituted by a treaty, using that word as

is to be a party and which would extend the present ambit of Community institutions. The question would be entirely at large, and it is important that it should be so.'

[21] And thus, s. 1(2) ECA was amended several times by Acts of Parliament, even though it may have been legally possible on some of those occasions not to use a new Act of Parliament (depending on whether the international measure to be incorporated was 'ancillary'). See n 8 above and accompanying text.

[22] HC Deb 7 March 1972, vol 832, col 1342 [https://perma.cc/G23C-QGV5].

[23] [1937] AC 326 (Privy Council). As the Solicitor General said, the case was cited during the debates in Parliament on numerous occasions as an authoritative expression of the orthodox legal and constitutional position in the United Kingdom, e.g., HC Deb 29 February 1972, vol 832, col 277-278 (Elystan Morgan MP) [https://perma.cc/DD3K-T8L7]; HC Deb 1 March 1972, vol 832, cols 451, 536-537 (the Chancellor of the Duchy of Lancaster) [https://perma.cc/63UH-NDRV]; HC Deb 6 March 1972, vol 832, col 1087 (Peter Rees MP) [https://perma.cc/2PC3-UTEG].

> comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose Legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the State by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses.[24]

The reference to Lord Atkin's judgment leaves no doubt as to the understanding adopted by the government of 1972 (which is also the correct legal position today). The only 'necessity' for seeking parliamentary approval for ratification of a treaty requiring (in international law) changes in domestic law is pragmatic or political. If a government ratifies a treaty out of step, so to speak, with Parliament (as would be the case in the hypothetical example of ratification of an ancillary treaty without waiting for each of the Houses of Parliament to approve a s. 1(3) ECA Order in Council), then the UK is left 'in default' of its international obligations. This provides a very strong practical reason for any government to wait for Parliament to provide for changes in domestic law in

[24] Ibid at (347)-(348).

advance (as happened with the ECA 1972 itself). But this does not entail a legal condition for ratification.

The conflicting statements on interpretation of s. 1 ECA made by MPs during the legislative stage, on which I am not relying, are even more damning to Lord Pannick's point that s. 1(3) ECA did not cover treaties amending the Community Treaties (and hence that an Act of Parliament was meant to be legally required for their incorporation). Some MPs suggested readings of s. 1(2) and s. 1(3) ECA that, for instance, would have given the executive powers to trigger incorporation through the ECA 1972 of *any* international treaty predating 22 January 1972 (the Treaty of Versailles was a favourite example).[25] If this interpretation is not convincing this should not be surprising, given that 'most members of Parliament were ignorant or confused about the nature and effect' of the ECA (as Jeffrey Goldsworthy pithily summarised Danny Nicol's findings on legislative history of the 1972 Act).[26] The 1972 government's representatives in Parliament presented the view closest to Lord Pannick's and yet one crucially different from his submission.

Contrary to what Lord Pannick claimed, there is nothing in the scheme of s. 1 ECA suggesting an intent *legally* to curtail the Crown's power to enter and withdraw from international treaties. Also, to the extent Parliament chose legally to condition the process by which a new 'ancillary' treaty (including at least some treaties significantly amending the Community Treaties) entered into by an exercise of Crown prerogative was to be incorporated in UK law, it did so by giving veto powers to each of the two Houses and *not* by requiring an Act of Parliament.

Beyond s. 1 ECA

The claimants (and Divisional Court) argued that the long title shows Parliament's intent that the ECA itself would make the UK a member of the EEC/EU. They had pointed to the words 'to make provisions in connection with the enlargement…to include…'. Finnis rebutted this by pointing to the difference between that formula and the one used

[25] See, e.g., HC Deb 8 March 1972, vol 832 [https://perma.cc/Z8RN-9BXC], col 1462 (Douglas Jay MP); HC Deb 14 March 1972, vol 833 [https://perma.cc/8JJ3-P6DV], col 319 (Michael English MP), col 329 (Enoch Powell MP).

[26] Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press 2010) 296; Danny Nicol, *EC Membership and the Judicialization of British Politics* (Oxford University Press 2001).

regularly: 'to make provision for and in connection with…' and he argued that this, like other features of the ECA, showed Parliament's intention to make no provision *for* the entry of the UK into the EEC, but instead to leave it to the Government to decide whether and when to make that provision for including the UK in the EEC – a provision made by ratifying the Accession Treaty – ratification which Parliament did not require, authorise or even purport to permit.[27] The only thing that Lord Pannick QC had in response to this is that Parliament did just that (did approve and intend precisely that the UK become a member of the EEC), because this follows from accepting that 'this new legal order should be introduced into domestic law'.[28]

The problem for Lord Pannick is that giving effect to EEC/EU law in domestic law did not entail his interpretation of the Parliamentary choice expressed in the 1972 Act. This interpretation is not needed for any of the accepted features of the relationship between UK law and EEC/EU law. Finnis' works just as well (and has the added benefit of reading the 1972 Act consistently with background law). To read the ECA the same way as Lord Pannick sounds a bit too much like assuming the conclusion the claimants are yet to prove. Perhaps Lord Pannick's reading is needed to ground the kind of supremacy of the EU's 'new legal order' that is expressly rejected in our authorities,[29] but this certainly does not help his case.

Conclusion on interpretation of the ECA 1972

What all this shows is that the scheme of the ECA 1972 assumed that the Crown has a power conclusively to enter (under international law) into treaties constituting important amendments to the Community Treaties. That power was not restricted in the ECA. Parliament only sought to influence its exercise by giving each of the Houses of Parliament (again, not to Parliament) a veto power on *incorporation* of such future treaties.

Relevantly to *Miller*, this strongly supports the view that the power to withdraw from the Community (now EU) Treaties was not, *in law*, curtailed by the ECA 1972. If it was

[27] Finnis (n 5).

[28] *Miller*, Transcript of proceedings, Tuesday 6 December 2016, p 188-191 [https://www.supremecourt.uk/docs/draft-transcript-tuesday-161206.pdf].

[29] See, e.g., *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591 [80] (Lord Mance JSC).

not curtailed by the ECA 1972, the most comprehensive regulation of effect of EU law in UK law, then why would we think that Parliament intended to effect non-contingent incorporation of EEC/EU law in later statutes, like the European Parliamentary Elections Act 2002 or the Communications Act 2003? The burden of proof is on the claimants and the proof is yet to be provided.

Judicial precedent and general principles

The claimants might have responded, and more or less explicitly did respond, that even if Finnis is right about the analogy between incorporation of double-taxation treaties and incorporation of EEC/EU law and that somehow my argument on the meaning of s. 1 ECA is incorrect or irrelevant, it just means that withdrawing from a double-taxation treaty by a prerogative act is unlawful. That it happened in the past does not entail it was done lawfully.

One serious problem that the claimants are facing is that there is no judicial authority dealing directly with limits of the prerogative power to withdraw from a treaty. All cases cited in *Miller* proceedings may be distinguished on this point. Admittedly, there is also no specific authority saying that the prerogative may be exercised as to withdraw from a treaty incorporated in UK law.

Hence, both sides fall back on general principle and on prior practice (or lack thereof). The government argues that it has a general power to withdraw from treaties, which it certainly does. The claimants argue that the executive does not have a power to frustrate a statute, which it certainly does not. The government argues that Parliament legislated in 1972 (and afterwards) against the background of a settled practice that the power of the Crown to withdraw from treaties is untrammelled. The claimants respond that there was never such treaty as the set of EU Treaties and hence the previous practice is irrelevant.

The government has a stronger case because the claimants have to make a bold argument rejecting previous legal practice and attributing a very robust intent to change the law in unprecedented ways to Parliament that enacted the 1972 Act and to subsequent Parliaments. How many Justices of the Supreme Court will recognise this remains to be seen.

About the Author

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